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145 U S 652

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1889.

JOHN J. SCHILLINGER ET AL.,
vs.
HENRY L. CRANFORD ET AL.
} No. 530.

MOTION TO DISMISS, AND BRIEF.

W. A. COOK,
ENOCH TOTTEN,
C. C. COLE,
ATTORNEYS FOR APPELLEES.

Law Reporter Print, 503 E.

IN THE

Supreme Court of the United States.

JOHN J. SCHILLINGER ET AL
vs.
HENRY L. CRANFORD ET AL. } No. 530.

TO MCDONALD, BRIGHT & FAY,
Attorneys for John J. Schillinger et al.:

Take notice that the following motion to dismiss the above-entitled cause, and the brief in support thereof, will be presented and submitted to said Court on Monday, the 21st day of April, 1890, at the meeting of said Court on that day, or as soon thereafter as counsel can be heard.

W. A. COOK,
ENOCH TOTTEN,
C. C. COLE,
Attorneys for H. L. Cranford.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM 1889.

JOHN J. SCHILLINGER ET AL.,
vs.
HENRY L. CRANFORD AND THE DISTRICT OF COLUMBIA.
} No. 530.

Motion to Dismiss.

And now come the attorneys for Henry L. Cranford, and entering their appearance in this Court specially for the purpose only of this motion, move the Court to dismiss this cause from the docket of this Court for the following reasons, to wit:

First. Because no appeal has been allowed or taken.

Second. Because the decree below was against the complainants jointly, and part, only, of them attempted to appeal without a summons and severance or other equivalent proceeding in the court below.

Third. Because no citation was served upon the defendants as required by law and the practice of this court.

W. A. COOK,
ENOCH TOTTEN,
C. C. COLE,
Attorneys for Henry L. Cranford.

Brief in Support of the Foregoing Motion.

STATEMENT OF THE CASE.

The bill was filed in the Court below by John J. Schillinger, Charles E. Creecy, George R. Herrick, Albert Elsberg, and Charles E. Creecy, as administrator of the estate of Lawrence R. Byrne, deceased, Creecy suing both in his own right and as administrator of Byrne, against Henry L. Cranford and the District of Columbia, complaining that the defendants had been and were infringing re-issued letters patent, numbered 4364, for an alleged improvement in concrete pavements, and praying for an injunction against further infringement and for an account and decree for damages alleged to have been already sustained. Schillinger is the patentee, and the other complainants claim an interest in the patent by assignment from him, filed with the bill, which he made in consideration of $600 and a royalty of one and a half cents per square foot on all pavement which should be laid under the patent in the District of Columbia. The language of the granting part of the assignment or license from Schillinger under which the other complainants claim is as follows: "Said John J. Schillinger * * * doth hereby grant and convey to the said (the other complainants) the sole and exclusive right and license to construct and lay the said patented pavement or sidewalk within the limits of the city of Washington and District of Columbia during the entire term of said patent, any renewal, extension, and improvement thereof." The contract provides for settlements and payments of royalty from time to time.

The 23d paragraph of the bill is as follows:

23d. That the plaintiff, John J. Schillinger, has been injured and suffered great loss and damage and the plaintiffs, Charles E. Creecy, George R. Herrick, Albert Elsberg

and Charles E. Creecy, administrator of the estate of Lawrence R. Byrne, deceased, have been seriously and irreparable injured and suffered great loss and damage and are still being injured, by reason of the unlawful use of the said Schillinger's patent as aforesaid, by the said defendants, Henry L. Cranford and the District of Columia as aforesaid; and by reason of the unlawful infringement of said patents aforesaid in the District of Columbia by the said defendants, the plaintiffs, John J. Schillinger, Charles E. Creecy, George R. Herrick, Albert Elsberg and Charles E. Creecy, administrator of the estate of Lawrence R. Byrne, deceased, have been deprived of great gains and profits and damaged to the extent of probably five thousand dollars and will be still further damaged and injured if the defendants, the the District of Columbia and H. L. Cranford are permitted to unlawfully use said patents.

The prayer of the bill is for an injunction and account, and the 6th paragraph thereof is as follows:

6th. That the court will assess, or cause to be assessed, the damages sustained by the plaintiffs, John J. Schillinger, Charles E. Creecy, George R. Herrick, Albert Elsberg and Charles E. Creecy, administrator of the estate of Lawrence R. Byrne, deceased, by reason of the violation of their rights under said patents by said defendants, Cranford and the District of Columbia.

The defendants answered, and evidence was taken on behalf of complainants and defendants, and at the hearing at Special Term of the court below a perpetual injunction was granted, as prayed, and an accounting ordered to ascertain the profits and damages, which decree was in favor of all the complainants jointly. From this decree the defendants appealed to the General Term of the court below, and upon hearing there the following decree was passed on the 7th day of July, 1885:

DECREE.

This cause came on to be heard in the General Term on appeal from the Special Term, and was argued by counsel, and the Court being of opinion that the defendants did not infringe the patent, or the reissued patent of the said complainant John J. Schillinger, by constructing pavements in the manner described in this cause. It is thereupon, upon consideration thereof, ordered, adjudged and decreed, that the decree of the Special Term herein be reversed, and the bill be, and the same is hereby dismissed, and that the complainants pay the costs of this suit.

From this decree an appeal was prayed by the complainants in open Court, and was granted by the Court on the day of July, 1885, during the same term at which the decree was passed, but that appeal never was perfected by giving bond and filing the record as required by law and the rules of this Court, and on the 26th day of October, 1885, the cause was, on motion of the attorneys for defendants, docketed and dismissed under the 9th rule, and and the mandate of this Court was filed and recorded in the Court below on the 4th day of June, 1886.

On the 27th day of June, 1887, the following paper with the notice thereto attached was filed in the clerk's office in the papers of said cause:

IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.
IN GENERAL TERM.

JOHN J. SCHILLINGER AND OTHERS
vs.
HENRY L. CRANFORD AND THE DISTRICT OF COLUMBIA. } Equity. No. 8665.

And now come the complainants, by McDonald, Bright, and Fay, their solicitors, and pray the Court for an appeal

to the Supreme Court of the United States from the decree entered herein on the 7th day of July, 1885, and for an order fixing the amount of appeal bond.

McDONALD, BRIGHT & FAY,
Solicitors for Complainants.

Capt. C. C. COLE,
Attorney for Cranford.

Take notice that we will call the above motion for hearing before the Court in General Term on Thursday November 4, 1886.

McDONALD, BRIGHT & FAY,
Solicitors for Complainants.

There is no evidence in the record that this motion and notice were served on opposing counsel.

And on the same day the following paper was filed in the cause in the clerk's office, to wit:

JOHN J. SCHILLINGER ET AL.
vs.
JOHN L. CRANFORD ET AL. } 8665.

The complainants appeal from the decree entered herein on the 7th day of July, 1885.

McDONALD, BRIGHT & FAY,
Solicitors for Complainants.

On the same day the following order was entered by the Court in General Term:

"Ordered, this 27th day of June, 1887, that the penalty of the appeal bond in the above cause be fixed at $250."

There was no order of the Court or of any judge granting a second appeal, and no notice to opposing counsel of the application for or the making of the above order.

On the first day of July, 1887, the following bond was approved by the chief justice of the Court below, and filed with the papers of the cause:

[Filed July 1, 1889.]

IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA, THE 28TH DAY OF JUNE, 1887.

JOHN J. SCHILLINGER ET AL., *Complainants*, *vs.* HENRY L. CRANFORD ET AL. *Defendants.* } Eq. Doc. 23. No. 8665.

Know all men by these presents, that we, Charles E. Creecy, John C. Parker, and William L. Finley, are bound unto the above-named Henry L. Cranford and the District of Columbia, defendants, in the sum of two hundred and fifty dollars, to be paid to the said defendants, its successors, and his executors or administrators. To which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors and administrators, firmly by these presents.

Sealed with our seals, and dated this 28th day of June, 1887.

Whereas, the above-named John J. Schillinger and Charles E. Creecy have prosecuted to the Supreme Court of the United States, —— to reverse the decree rendered in the above suit by the said Supreme Court of the District of Columbia:

Now, therefore, the condition of this obligation is, that if the above-named John J. Schillinger and Charles E. Creecy

shall prosecute this said appeal to effect, and answer all damages and costs if they shall fail to make good their plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

CHARLES E. CREECY.
JOHN C. PARKER.
WILLIAM L. FINLEY.

Sealed and delivered in presence of—
L. HUYCK,
H. J. M. LAUGHLIN.

Approved:
ED. F. BINGHAM,
Chief Justice.

[Indorsed:] Eq. 8665. Schillinger et al. *vs.* Crawford. Appeal Bond, S. C. U. S. Sureties satisfactory.
C. C. COLE,
for Compl'ts [*Defendants*].

On the 5th of July, 1887, the following citation was served on the attorney for Cranford only:

Citation.

DISTRICT OF COLUMBIA, *to wit:*

To Henry L. Cranford and the District of Columbia:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a *writ of error* filed in the clerk's office of the Supreme Court of the District of Columbia, wherein John J. Schillinger, Charles E. Creecy, as administrator, George R. Herrick and Albert Elsberg is plaintiff, and you are defendant, to show cause, if any there be, why the judgment

in the said *writ of error* mentioned should not be corrected, so that speedy justice be done the parties in that behalf.

Witness, E. F. Bingham, Chief Justice of the said Supreme Court of the District of Columbia.

Service admitted July 5th, 1887. C. C. Cole, solicitor for defendant Cranford.

Points and Authorities.

FIRST.—NO APPEAL WAS TAKEN.

The appeal granted in open court during the term at which the decree was rendered, was never docketed in this Court by the appellants, and was finally disposed of by being docketed and dismissed on motion of the appellees. The appellants can take nothing by that appeal. The case stands the same as if that appeal had never been taken.

Hewit *vs.* Filbert, 116 U. S., 142, and cases there cited.

There was no other attempt to take an appeal until the 27th day of June, 1887, a few days only before the right of appeal was barred. The notice attached to the motion or petition for appeal states that the motion will be made on the 4th day of November, 1886, but no motion was made at that or any other time and the paper was not filed in the clerk's office of the court below until the 27th day of June, 1887.

The attempt to take the second appeal was not made during the term of the court below, at which the final decree in the cause was passed. That decree was made on the 7th day of July, 1885, and that term adjourned without day on the—day of the same month. The transcript of the record sent to this Court shows that the order made by the General Term of the court below, fixing the penalty of

the appeal bond, was made at a term of that court, commencing on the 4th Monday of April, 1887. Besides the law (Sec. 756, R. S. U. S., relating to the District of Columbia), provides that there shall be at least three terms of that court per year.

There is no order of the court below, or of any judge thereof, or of any justice of this Court granting an appeal. It is not pretended that any was applied for or made. The attempt was made to take an appeal by having a citation signed and served and a bond approved.

It has been repeatedly held, and is the settled rule of this Court, that in order to take an appeal in this manner, three things are essential to be done in order to confer jurisdiction upon this Court, to wit: The signing of a citation by the proper judge or justice, the service thereof upon the appellees, and the docketing of the appeal in this Court during the next ensuing term after the signing and service of the citation. Each of these are jurisdictional acts, and the omission of any one of them will defeat the jurisdiction.

Hewitt *vs.* Filbert, 116 U. S., 142.
Brown *vs.* McConnell, 124 do., 489, and authorities there cited.

In the case last cited the court says: "To get an appeal after the term at which the decree is rendered a party must apply to the proper justice or judge to sign a citation. If he signs it he furnishes the applicant the means of getting his case into this court, and in legal effect allows an appeal. All the appellant has to do after that to give this court jurisdiction both of the subject matter of the appeal and of the parties, is to serve his citation and to docket the case here in time."

It is respectfully submitted that no citation to answer an appeal in the cause mentioned in the transcript of the record was signed or served. The citation found in the record is not a citation

to answer an *appeal* in the case sought to be removed, but is void and inoperative for the following, amongst other reasons, to wit:

First. The parties mentioned in the citation are not the same as the parties to the record sought to be removed by appeal.

Second. It purports to be a citation to answer a *writ of error* and not an *appeal*.

Third. It was served on one only of the two defendants sued jointly in said cause.

1. The citation refers to a cause in which John J. Schillinger, Charles E. Creecy, as administrator, George R. Herrick and Albert Elsberg are plaintiffs, and Henry L. Cranford and the District of Columbia are defendants. The record filed by the appellants, with this citation attached, shows a case in which John J. Schillinger, Charles E. Creecy, George R. Herrick, Albert Elsberg, and Charles E. Creecy, administrator of Lawrence R. Byrne, deceased, are complainants, and Cranford and said District are defendants. This is not the case referred to in the citation. No citation has been signed in the case, the record of which has been filed in pursuance of the supposed appeal. The variance is fatal. This position is rendered conclusive by recurrence to the adjudications of this court, that in taking an appeal in this manner, the signing of the citation is the granting of an appeal. Surely, the signing of a citation in some other cause, or in a supposed cause in which the parties are variant from those in the cause sought to be removed, cannot be said to grant an appeal in a cause not set forth in the citation.

2. The citation is to appear in this Court "pursuant to a *writ of error* filed in the clerk's office of the Supreme Court of the District of Columbia." But no *writ of error* such as is described in the citation was issued or filed in the clerk's office of said last-named court, and none appears attached to the record filed in this Court. The record filed is that

of an equity cause, which could not be removed into this Court by *writ of error*, and if one had been issued and returned in said cause it would have been dismissed upon motion.

McCullom *vs.* Eager, 2 How., 61.
Walker *vs.* Dreville, 12 Wal., 440.
Murdock *vs.* Memphis, 20 Wal., 622.
Hayes *vs.* Fisher, 102 U. S., 122.

The signing of a citation to appear to a writ of error, in a cause in which such a writ does not lie, cannot be said to be the *allowance of an appeal* in such cause; and procuring such a citation to be signed and served, cannot be said to be the *taking of an appeal.* It is to be borne in mind that the attempt was to take an appeal by the issuance and service of a citation. But there being no citation to answer an *appeal* no *appeal* was taken or allowed.

3. The citation was served on one only of the two defendants sued jointly. If the appeal had been granted by the Court during the term at which the final decree was rendered, and security had not been taken until after the term, so as to have rendered a citation necessary, service upon one only of several joint defendants would not have defeated the jurisdiction of this Court. But in this case the service, as well as the signing of the citation, becomes jurisdictional, and failure to serve one joint defendant is a failure to make such defendant a party to the appeal, and contravenes the rule that all the parties to the suit in the court below interested in maintaining the decree must be made parties to the appeal, and failure to do this is ground of dismissal. This subject is considered under the next point in this brief.

SECOND.

The interest of the complainants in the subject-matter of the suit is joint, and the decree sought to be appealed from dismissing the bill is against them all jointly. Less than all the complainants cannot appeal without a summons and severance, or equivalent proceeding below, and none was had or attempted. This rule applies to appeals as well as writs of error. And this is a defect not amendable in this Court.

Estis *vs.* Trabue, 128 U. S., 229.
Feibelman *vs.* Packard, 108 U. S., 14.
Moore *vs.* Symonds, 100 U. S., 145.
Simpson *vs.* Greeley, 20 Wal., 152.
The Protector, 11 Wal., 82.
Masterson *vs.* Herndon, 10 Wal., 416.
Owings *vs.* Kincannon, 7 Pet., 399.

In Owings et al. *vs.* Kincannon, there was a decree in the Court below requiring Owings and five others to convey all their interest in a certain tract of land to appellee. In the order allowing the appeal, the case was stated generally as Kincannon and Owings et al., and the order granted the appeal to the defendants. The bond recited that three of the defendants, giving their names, had prayed for and obtained an appeal. The Court held that the recital of the bond explained the general entry granting the appeal, and that as all had not appealed and there had been no severance, the appeal was dismissed. This case also holds that the same principle applies in this regard to an appeal as to a writ of error.

That case is exactly in point here. The petition or motion for appeal states the complainants as "Schillinger et al." The bond recites that "John J. Schillinger and Charles E. Creecy have prosecuted—to the Supreme Court of the United States." In the condition of the bond only is

the word appeal found. Creecy is the only one of the complainants who signed the bond. If the bond is taken as explanatory of the motion for an appeal, then Shillinger and Creecy are the only complainants who appealed. If the citation can be looked to for the purpose of ascertaining who intended to appeal, it appears that Creecy joined in it only as administrator, and not in his individual right, and that he joined as administrator of Herrick and not of Byrne. In either event it appears that all the complainants did not join in the attempt to appeal.

In Moore *vs.* Simonds the appeal was taken in the firm name without setting out the names of the individual members of the firm, but their names were all set out in the appeal bond, and each of them signed it, and it was held that the appeal could be amended by the bond. It is clearly intimated in that case that in order to make amendment proper there must be something in the "appeal papers," *i. e.*, the petition for appeal, bond, or citation by which the amendment can be made. There should be something to show that there was an intention and effort to appeal by all the parties against whom a joint decree is rendered. If less than all of several joint parties may appeal, and when the record comes up the names of the others may be added in this Court as appellants, this would be allowing a new appeal instead of amending an informal one. And in Estis *vs.* Trabue it was expressly decided that the defect in question is jurisdictional and cannot be cured by amendment.

The case of Feibelman *vs.* Packard seems also to be directly in point. In that case there was a joint judgment against two plaintiffs. One only sued out a writ of error. The Court held that as their interests in the subject-matter of the litigation was joint, one only could not maintain the writ, and it was dismissed.

The interests of the complainants in the subject-matter of this suit, according to the allegations of the bill, are joint.

They were all necessary parties to the bill, and are equally so to an appeal.

Curtis on Patents (4th ed.), secs. 345 to 347, both inclusive, and 402 to 405, both inclusive.
Woodworth *vs.* Wilson, 4 How., 712.
Gaylor *vs.* Wilder, 10 How., 477.
Story's to Eq. Pl., secs. 72, 159, and 166.

THIRD.

NO CITATION HAS BEEN SERVED UPON THE DEFENDANTS.

This subject has been considered under the first point of this brief. If it could be held that an appeal had been allowed or taken, it was done after the term at which the decree was entered, which rendered a citation to *answer the appeal* necessary. *Hewitt* v. *Filbert, supra.* A citation to answer a *writ of error*, even if otherwise regular, would not give this court jurisdiction of an *appeal.*

The motion to dismiss should be allowed.

WM. A. COOK.
ENOCH TOTTEN.
C. C. COLE.
For Appellee, Henry L. Cranford

FILED
APR 28 1890
JAMES H. McKENNEY
CLERK

In the Supreme Court of the United States.

No. 530.

JOHN J. SCHILLINGER et als., Appellants,

vs.

HENRY L. CRANFORD, et al., Appellee.

Brief of Appellants on Motion to Dismiss.

J. E. McDONALD,
R. J. BRIGHT,
JOHN C. FAY,
Attorneys for Appellants.

IN THE

Supreme Court of the United States.

SCHILLINGER *et als.*
vs.
CRANFORD *et al.* } No. 530.

Stipulation.

It is hereby stipulated and agreed that it appears upon the original motion for an appeal in this cause the following indorsement, viz.:

"Service of copy admitted October 30, 1886; C. C. Cole, pr W. L. Cole, solicitor for defd't,"

and upon the original citation the following indorsement in the handwriting of the clerk of the court, viz.:

"8665; Equity Doc. 23; Schillinger *et al. vs.* Cranford *et al.*; citation; filed July 5, 1887, R. J. Meigs, clerk,"

and that this stipulation shall stand as part of said record in the consideration of the motion to dismiss on the part of the appellee, noticed for April 21, 1890, and that said motion shall not be submitted until April 28, 1890.

JOHN C. FAY,
Attorney for Appellant.
ENOCH TOTTEN,
C. C. COLE,
Attorneys for Appellee.

Statement of the Case.

The foregoing stipulation serves the purpose of a *certiorari* in bringing before the court certain parts of the record omitted from the transcript.

The decree in this cause was passed on the 7th day of July, 1885. As stated by appellee, the first appeal prayed from this decree was dismissed under the 9th rule on motion of attorneys for defendants.

On the 30th day of October, 1886, notice of motion of the present appeal from the decree of July 7, 1885, as set out in appellee's brief, was served upon counsel for appellee, and, as appears from the above stipulation, service of this motion was admitted by him.

The appeal of complainants, as appears by appellee's brief, was filed June 27, 1887, and the same day the Supreme Court of the District of Columbia passed its order fixing the penalty of the appeal bond.

The bond, as appears from brief of appellee, approved by the Chief Justice of the Supreme Court of the District of Columbia, the sureties thereon *having first been approved by appellee's* counsel, was filed July 1, 1887, and on the 5th of the same month the citation printed in appellee's brief was served upon appellee's counsel, and service admitted by him.

Brief and Authorities.

FIRST.

An appeal was taken.

In Railroad Company *vs.* Bradleys (7 Wall., 573) the court says, at page 577:

"It is true that it does not appear upon the record directly that there was an allowance of the appeal; but an appeal was prayed and subsequently the appeal bond was

filed in the court and approved by one of the judges, and we think it may be properly inferred from these facts that an appeal was actually allowed."

In Brown *vs.* McConnell (124 U. S., 489) the court decided that the approval of an appeal bond by a judge having that power was by implication an allowance of an appeal.

In Sage *vs.* The Railroad (96 U. S., 715) the court says:

"When, therefore, Mr. Justice Hunt accepted the security in this case after the term under which the decree was passed, he allowed an appeal, which, by reason of the form of the security, was to operate as a *supersedeas*. No question in respect to a citation arises because the appellees have appeared."

See, also,

Brandies *vs.* Cochrane, 105 U. S., 262, and Hudgins *vs.* Kempt, 18 How., 530.

In addition to the facts set out in Railroad *vs.* Bradleys, there was in the case at bar the order of the court fixing the amount of the appeal bond. If it should be attempted to distinguish the case at bar from those cited above, upon the ground that in them the appeal was prayed in open court, it is to be replied that in the case at bar (without now taking into consideration the question of the citation), there are the admission by Mr. Cole of service of motion for an appeal, and upon the bond filed in the case his admission that the sureties therein named were satisfactory. As to this last point, see Goodwin *vs.* Fox, 120 U. S., 775.

SECOND.

The appeal in this case has been perfected.

In Brown *vs.* McConnell, *supra*, the court says:

"To get an appeal after the term at which the decree is rendered, a party must apply to a proper justice or

judge to sign the citation. If he signs it he furnishes the appellant the means of getting his case into this court, and in legal effect allows an appeal. All the appellant has to do after that to give this court jurisdiction, both of the subject-matter of the appeal and of the parties, is to serve his citation and to docket the case here in time."

It is admitted that the citation was signed by the proper judge and properly served upon the appellee, who makes this motion. This citation, by the error of the clerk, omits from the parties named in it Mr. Creecy in his individual capacity, and it is made a citation to answer a writ of error, but upon it is the indorsement set out in the above stipulation.

Mr. Phillips, in his work on United States Supreme Court Practice, says on page 231:

"While the want of citation and due service is generally fatal, yet, as its object is to give notice, the court has given a liberal rather than a strict construction to this requirement. Where, therefore, the parties have *had notice in* FACT that an appeal has been taken, the citation is held to be unnecessary."

U. S. *vs.* Gomez, 1 Wall., 690.
Goodwin *vs.* Fox, 120 U. S., 775.
Bigler *vs.* Waller, 12 Wall., 142.
Dayton *vs.* Lash, 94 U. S., 112.

In the Case of Bigler *vs.* Waller the court says:

"Viewed in any reasonable light it seems to the court that the attorney knew that the appeal was allowed by the court and was prosecuted by the appellant, which is the *one purpose* intended to be effected by the citation."

Undoubtedly the citation in the case at bar answered every purpose of a citation. The counsel of the defendant knew that the appeal had been prayed; that the order ~~allowing~~ fixing the amount of bond the appeal was passed, and he admits, not

only service on the citation, but that the sureties in the appeal bond were satisfactory to him.

Upon this citation was indorsed the title of the equity suit. The complainants and defendants named in the citation, with the exception that Mr. Creecy was not named individually as well as administrator, were the same as those engaged in the equity suit, and to hold that such an error of the clerk in making it a citation to a writ of error instead of a citation to an appeal, as it should have been, is fatal, would be to overthrow the spirit of the decisions of this court.

THIRD.

The omission of Mr. Creecy in his individual capacity from the citation is a defect which may be cured under section 1005 of the Revised Statutes.

It is shown by brief of appellee that the complainants in the bill below were John J. Schillinger, Charles E. Creecy, George R. Herrick, Albert Elsberg, and Charles E. Creecy as administrator of the estate of Lawrence R. Byrne, deceased. This bill is, of course, a part of the record.

In the prayer for an appeal the case is stated as John S. Schillinger and others, but the prayer reads "And now come complainants." Again, in the appeal, it is stated "the *complainants* appeal from the decree entered herein," etc.

By section 1012 of the Revised Statutes it is provided that appeals shall be covered by the same rules as writs of error, while section 1005 provides that the court may allow an amendment of a writ of error when the statement of the title of the action or parties thereto in the writ is defective, if the defect can be remedied by reference to the *accompanying record* and in all other particulars of form.

With this state of the law, Moore *vs.* Simons is not subject to the construction of appellee that *only* the appeal papers can be looked to for any deficiencies. The statute expressly says "*the accompanying record*" may be examined, nor do any of the cases cited subsequent to the passage of this statute of *jeo-fails* (1005 R. S.) so hold.

FOURTH.

The fact that some only of the appellants signed the appeal bond is urged by appellee as showing that the appeal was prayed only by those who signed.

What has just been cited is applicable also to this point, but appellee insists that the case of Owings *et al. vs.* Kincarmon, 7 Pet., 399, is exactly in point here. In that case the bond recited that three of the defendants, giving their names, had prayed for and obtained an appeal. The court held that the recital of the bond explained the general entry granting the appeal, and that as all had not appealed and there had been no severance the appeal was dismissed.

The examination of this case shows that part only of the defendants in fact *appealed*, while in the case at bar *all* of the defendants claim and are prosecuting their appeal.

If, however, the case in 7 Peters were capable of the construction put upon it by appellee it must be held to have been overruled by the case of Brocket *et al. vs.* Brockett, 2 How., 238, where the Supreme Court expressly held that an appeal bond *approved* by the court is sufficient, though it is signed by only part of the appellants.

The rule is, as stated by appellee, that where some only of joint defendants take an appeal, it must be dismissed unless there has been the equivalent of summons and severance; but here all of the complainants have taken their appeal and all are interested in prosecuting it.

FIFTH.

This leaves as the only remaining point made by appellee the fact that the citation was served on one only of the two defendants sued jointly.

If the motion here were made by the defendant not served it might be of some force, but it is not conceivable how the appellee upon whom service has been obtained can urge this objection. The District of Columbia may, before the case is reached in its order, enter a general appearance, and this would be a waiver as to itself of the defect suggested by the appellee who has been served.

Again, to make this point tenable, it would have to be held that where one of two defendants is absent from the jurisdiction, a failure to get service upon him would relieve the other defendants from the consequences of an appeal.

The case at bar being for an infringement of a patent, sounds in tort and not in contract, and to sustain the motion of appellee it would be necessary to hold that the failure to get service upon one *tort-feasor* would relieve the one who joined with him in the wrong.

The mere statement of the consequences of sustaining appellee's motion upon this point is sufficient without the citation of authorities.

Appellee's motion to dismiss should be overruled.

JOSEPH E. MCDONALD,
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